IN THE

Supreme Court of Virginia

RECORD NO. 160500

LAWRENCE E. GELBER AND DARLENE A. FLEISCHMANN, Co-Executors of the Estate of Beverly E. Gelber, Deceased and Co-Trustees of The Beverly E. Gelber Trust, Dated Dec. 1, 2010, as restated and amended,

Appellants,

v.

MERYL ANN GLOCK,

Appellee.

OPENING BRIEF OF APPELLANTS

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I. STATEMENT OF THE CASE

a. Nature of the Case & Material Proceedings Below

This case arises out of an elderly mother's attempts to take back her home and personal belongings from one of her daughters who, through undue influence and deceit, took advantage of her mother's weakened physical and mental state while in the hospital.

Beverly E. Gelber ("Mrs. Gelber") sued her daughter Meryl A. Glock ("Mrs. Glock"), alleging that Mrs. Glock deceived and manipulated her into giving up her home (the "Edwardsville Home" or "Real Property") and all the possessions in it (the "Personal Property") on July 18, 2014. After Mrs. Gelber's passing on September 19, 2014, two of Mrs. Gelber's four other children, Dr. Lawrence E. Gelber ("Dr. Gelber") and Darlene A. Fleischmann ("Mrs. Fleischmann," together with Dr. Gelber, the "Executors"), continued the lawsuit as executors and trustees to return the Real and Personal Property to their mother's estate, alleging undue influence, fraud, conspiracy, and other legal and equitable remedies.

The trial court barred Mrs. Glock's disposition of the Personal Property during litigation.[1] Mrs. Glock counterclaimed against the Executors

[1] (J.A. 1–2.) The Honorable Catherine Hammond initially presided in this matter in Henrico Circuit Court. After her retirement, the Honorable Gary A. Hicks presided.

seeking attorney's fees to defend her title to the Personal Property.[2] Executors sought partial summary judgment to settle ownership over the Personal Property in the trustee,[3] but the trial court disagreed.[4] A jury trial ensued. After the Executors' case, the trial court made its own factual and legal findings,[5] short-circuiting and taking the case from the jury by granting Mrs. Glock's Motion to Strike on all counts and sustaining her Counterclaim.[6] Despite Mrs. Glock's valuation of the Personal Property at only $34,744, the trial court awarded her $370,850.75 in attorney's fees and costs.[7]

Executors timely objected to all adverse rulings of the trial court and noted this appeal.

b. Background Facts

On July 18, 2014, Beverly Gelber lay sick and near the end of her life at St. Mary's Hospital.[8] She was an 87 year-old widow, dying of terminal cancer, dehydrated, disoriented, and confused about her failed

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[2] (J.A. 100–04.)
[3] (J.A. 118–20.)
[4] (J.A. 131–32, 133–35.)
[5] (J.A. 1251 at lines 11–16; *see generally* 1246–51.)
[6] (J.A. 150–53, 348–51.)
[7] (J.A. 348–51.)
[8] (J.A. 709–12, 715–17, 719–40, 778–85, 815,1456–61.)

chemotherapy treatment and circumstances.[9] She would only live for another two months.[10] That day, Mrs. Glock visited Mrs. Gelber.[11] On her arrival, at 5:13 p.m., Mrs. Glock called the hospital's notary public requesting to meet.[12]

When the notary arrived, Mrs. Glock withdrew from her bag two legal documents.[13] The first was a Deed of Gift giving the Edwardsville Home to Mrs. Glock; the second was a Bill of Sale selling the Personal Property to Mrs. Glock for $1.[14] Neither Mrs. Glock nor Mrs. Gelber read or spoke with an attorney about these documents.[15] Mrs. Glock presented them to her mother, who—according to Mrs. Glock—immediately signed the documents after saying "Just give me the pen."[16] Mrs. Glock then left with the papers.[17]

Moments later, and not knowing his sister Mrs. Glock had just visited, Dr. Gelber (a medical doctor) arrived at the hospital to visit his sick mother. At 5:32 pm, just nineteen minutes after Mrs. Glock called the notary, Dr. Gelber texted his sister, Mrs. Fleischmann, to report on their mother's

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[9] (J.A. 709–11; *see generally* J.A. 636–39, 706–36, 778–85, 815, 831–33, 1456–61.)
[10] (J.A. 1504.)
[11] (J.A. 1114–15, 1119–20, 1125.)
[12] (J.A. 1114–15, 1120–21, 1510, 1512.)
[13] (J.A. 1124–25.)
[14] (J.A. 1112, 1316–20.)
[15] (J.A. 1530–32, 881–83, 1091–92, 1113, 1124–26.)
[16] (J.A. 1124–26.)
[17] (J.A. 1531–32.)

condition from her hospital bedside.[18] During that visit, Mrs. Gelber awoke showing confusion (calling Dr. Gelber "Doug," the name of another sibling), and weakness.[19] Dr. Gelber did not see Mrs. Glock or the notary.[20]

Mrs. Gelber's medical condition on July 18, 2014 was consistent with medical records documenting her month-long weak and confused state throughout her hospitalization.[21] She wasted to 90 pounds and lacked awareness of her ongoing bowel incontinence, screaming with confusion as nurses and her adult granddaughter cleaned her soiled diapers and her skin in this area broke down.[22] Her constant diarrhea, dehydration, and imbalanced electrolytes impaired her ability to understand medical advice to end chemotherapy as a failed treatment she would not survive.[23] Dr. Dennis O'Neill, a geriatrician medical doctor, offered uncontroverted expert testimony that Mrs. Gelber was severely compromised and debilitated on July 18, 2014.[24]

To conceal her manipulation of her mother's weakened condition, Mrs. Glock fabricated a false account of the document signing. She claimed

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[18] (J.A. 1173–75, 1388.)
[19] (J.A. 1173–75.)
[20] (J.A. 1172–73, 1189.)
[21] (J.A. 1426–69.)
[22] (J.A. 839–46, 942–46, 1171, 1387–88, 1453.)
[23] (J.A. 815–17, 839–46, 851–53, 1441, 1449, 1453.)
[24] (J.A. 709–11; *see generally* 709–36, 778–88, 863.)

her sister Linda Landa and her brother-in-law Philip Landa (the "Landas") called Mrs. Glock's cell phone just prior to and for the duration of the document execution.[25] Yet phone records proved the Landas made no calls to Mrs. Glock between 5:13 p.m. and 5:32 p.m., the window of time in which the signing occurred.[26] Thus, Mrs. Glock's account of a long and happy document execution, telephonically witnessed by the Landas, was impossible and proven a lie.[27]

Before July 18, Mrs. Glock and the Landas conspired to contact several attorneys to aid in the property conveyances.[28] The first attorney, Greg Foreman, refused to help because of his discomfort over the urgent nature of Mrs. Glock's and the Landas' requests because they were not the putative grantor.[29] A second attorney, Tom Eubank, helped Glock and the Landas as requested. Yet, no one from his firm met or spoke with Mrs. Gelber, the grantor, whom Mr. Eubank believed to be his client.[30] In fact, no one informed Mr. Eubank of the family dynamics, Mrs. Gelber's prior estate

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[25] (J.A. 1120–27, 1510–13.)
[26] (J.A. 1114–27, 1189, 1388, 1510–13.)
[27] Mrs. Glock stated her mother and the notary discussed her discharge (J.A. 1123–24), which occurred after 5:13 p.m. despite hospital records noting that at 4:28 p.m. Mrs. Glock knew discharge was impossible that day (J.A. 1457–58).
[28] (J.A. 1100, 1104, 1517, 1525–52.)
[29] (J.A. 1525–29.)
[30] (J.A. 879–83, 886, 1091–92, 1113, 1125.)

plans, or her hospitalization at the time.[31] Mrs. Glock picked up the conveyance documents from Mr. Eubank's office, took them to the hospital for her mother's signature, and returned them to Mr. Eubanks's office for recording.[32]

Mrs. Glock and the Landas secretly[33] hired Mr. Eubank despite knowing Mrs. Gelber already had her own attorney.[34] In 2010, for nearly a year, Mrs. Gelber worked with attorney Tim Guare to carefully draft her estate plan dividing her estate equally among her five children (Dr. Gelber, Mrs. Fleischmann, Mrs. Glock, Doug Gelber, and Mrs. Landa).[35] Mr. Guare copied Mrs. Glock on all drafts and communications,[36] and Mrs. Landa was aware of the process.[37] Mrs. Glock attended the initial planning meeting with her siblings and Mrs. Gelber at Mr. Guare's office.[38] Despite Mrs. Gelber's history of active, careful estate planning with legal counsel of her choosing,[39] Mrs. Glock procured legal documents from a different attorney

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[31] (J.A. 881–87, 1530–32.)
[32] (J.A. 1113, 1530–52, 1124–26.)
[33] (J.A. 1105–11.)
[34] (J.A. 1099–1101, 1389–93, 1553–1608.)
[35] (J.A. 616–17, 621, 1303–15.)
[36] (J.A. 1553–54, 1556–58, 1563, 1577–83.)
[37] (J.A. 622–24.)
[38] (J.A. 620, 1052–55.)
[39] (J.A. 611–16, 619–22, 626, 803–04, 1055, 1101, 1283–1315, 1553–1608.)

for Mrs. Glock's sole benefit and without her mother receiving any legal advice.[40]

At the time of her 2010 estate planning with Mr. Guare, Mrs. Gelber also transferred the Personal Property to the trustee of her trust by executing a tangible personal property deed (the "TPP Deed").[41]

From time to time Mrs. Gelber, when healthy, shared and entertained ideas about altering her estate plan, including selling the Real Property to fund an addition onto Mrs. Glock's home for Mrs. Gelber's residence.[42] (Later, during this litigation, Mrs. Glock denied this plan existed, even though several members of Mrs. Gelber's family were aware of the plan even while Mrs. Gelber was alive.[43]) Mrs. Gelber even considered, months before her July 2014 hospitalization, skipping her children's generation in her estate planning to leave everything to her ten grandchildren,[44] whom she adored.[45] By all accounts, when well, Mrs. Gelber was a strong person who knew her own mind and carefully planned her affairs with precision.[46] Despite considering other possibilities after 2010, and despite being

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[40] (J.A. 884–85, 1099–1105, 1113, 1125–26, 1525–1608.)
[41] (J.A. 1315.)
[42] (J.A. 612–13, 624–26, 814–15, 820–21, 1171–72, 1335, 1388.)
[43] (J.A. 1050–51.)
[44] (J.A. 1141–43.)
[45] (J.A. 893–94, 928, 1348–51.)
[46] (J.A. 611–16, 619–22, 626, 636, 803–04, 1055, 1283–1315, 1553–1608.)

generous in her lifetime to all her children,[47] while she was healthy and strong, she steadfastly ***preserved*** her 2010 estate plans to divide her estate equally among her children. After all, she loved all her children, including the Executors, with whom she maintained strong relationships over the years.[48] Not until July 18, 2014, while enfeebled and in the hospital, did she execute *inter vivos* transfers contrary to her previous carefully made plans.

Once executed on July 18, Mrs. Glock and the Landas hid the Deed of Gift and Bill of Sale from the rest of the Gelber family,[49] including Mrs. Glock's own husband.[50] They kept the secret until July 29, 2014, when Mrs. Glock—together with the Landas—falsely accused Mrs. Fleischmann and her daughters of stealing from Mrs. Gelber when, in fact, they were securing personal property at Mrs. Gelber's request due to her extended hospitalization.[51]

On that date, Mrs. Glock revealed her claimed title to the Real and Personal Property.[52] The Fleischmanns were shocked and asked Mrs.

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[47] (J.A. 627–28.)
[48] (J.A. 825–26, 1150–51, 1347–51.)
[49] (J.A. 645–48, 957–63, 1106–11.)
[50] (J.A. 1106–07.)
[51] (J.A. 640–44, 899–902, 956–63, 1107–11.)
[52] (J.A.647–47, 957–60, 962, 1111.)

Gelber about it,[53] who by then had been discharged to Beth Sholom Home based on her improved health and cognition.[54] Mrs. Gelber was stunned. She had no recollection of giving away her property, felt she had been in a coma[55] while at St. Mary's Hospital, insisted that, when well, she would never have signed the Deed of Gift and Bill of Sale, and she felt betrayed by Mrs. Glock's actions when she was so sick and weak. She confirmed these statements in a sworn affidavit and to numerous people in the last months of her life.[56] Mrs. Gelber felt particularly wounded given her special relationship with Mrs. Glock, who was a joint owner of Mrs. Gelber's checking account, a frequent visitor, and a provider of a variety of services.[57] They were close, and Mrs. Gelber doted on Mrs. Glock's daughter Mara.[58]

Mrs. Glock, by contrast, long resented Mrs. Fleischmann and Dr. Gelber, to whom she had acted maliciously for many years. She resented them over petty things (e.g., about the cars or houses they bought[59]) and

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[53] (J.A. 647–48, 961–63, 1111.)
[54] (J.A. 817–18, 1208–09, 1469–84.)
[55] (J.A. 647, 697, 703, 962–63, 1190.)
[56] (J.A. 650–53, 669–72, 697–98, 822–23, 911–14, 961–63, 1335, 1411–14, 1408–10, 1476–84, 1489, 1499.)
[57] (J.A. 628–31, 807, 857–58, 1038–40, 1045–49, 1130–31, 1135–36, 1210, 1327, 1333.)
[58] (J.A. 625, 628, 631, 685, 913.)
[59] (J.A. 1027–34, 1058–62, 1072–80, 1082–85, 1094–96, 1168–69.)

big things (e.g., anger over Mrs. Fleischmann's requests for help years earlier when she underwent treatment for a serious illness[60]). Mrs. Glock also controlled her mother's activity by blocking the Executors' and other family members' access to Mrs. Gelber's financial and medical information contrary to Mrs. Gelber's wishes.[61] To exert this control, Mrs. Glock berated her mother or withheld services from her if Mrs. Gelber ever contradicted Mrs. Glock.[62]

In addition to taking her mother's Real and Personal Property, on July 30, 2014, Mrs. Glock took—also without Mrs. Gelber's permission—$7,500 in cash from Mrs. Gelber's checking account.[63] Mrs. Glock claimed this theft was necessary to pay Mrs. Gelber's bills, including those related to the Edwardsville Home, which, by the time of the theft, Mrs. Glock claimed Mrs. Gelber no longer owned.[64] After receiving a demand from Mrs. Gelber's lawyer, Mrs. Glock reluctantly returned the money.[65] She continued, though, to refuse her mother's demands to return all the Real and Personal

[60] (J.A. 632–64, 1025–34, 1072–86.)
[61] (J.A. 628–30, 655, 819–20, 930–37, 950–53, 1165–67, 1175–79, 1322–23, 1324–34, 1408–10.)
[62] (J.A. 631–32, 931–32, 1163–64.)
[63] (J.A. 654–55, 1130, 1321, 1408–14.)
[64] (J.A. 1130–35, 1316–20.)
[65] (J.A. 645–55, 699–701, 1408–10.)

Property.[66] After months of unmet demands for return of her property, unmet pleas for certain other items (e.g., toiletries, clothing, reading glasses, oxygen tanks),[67] and nearly two months of despair over Mrs. Glock's betrayal,[68] Mrs. Gelber finally succumbed to cancer.[69]

II. ASSIGNMENTS OF ERROR

Executors identify the following Assignments of Error, including reference to the preservation of each in the Record.

a. **The trial court erred by granting Mrs. Glock's Motion to Strike Executors' Undue Influence Claim (Counts II and IV) at the close of Executors' evidence by making findings of fact and law contrary to the standard of review, failing to review the evidence in the light most favorable to Executors, and failing to apply the correct elements of an undue influence claim. ("Assignment of Error No. 1)** (J.A. 150–53, 1247–51.)

b. **The trial court erred when it ruled statements by Mrs. Gelber disavowing the Deed of Gift and Bill of Sale were inadmissible in an undue influence case, contrary to the Dead Man's Statute, Va. Code § 8.01-397 and Va. S. Ct. Rule 2:804. ("Assignment of Error No. 2")** (J.A. 150–53, 1247–51.)

c. **The trial court erred by granting Mrs. Glock's Motion to Strike Executors' Fraud Claim (Count I) at the close of Executors' evidence by making findings of fact and law contrary to the standard of review and failing to review the**

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[66] (J.A. 648, 650, 654, 1180–81, 1352–56, 1398–1410.)
[67] (J.A. 648, 654, 824–25, 853–54, 897–98, 916–947.)
[68] (J.A. 669–71, 680–86.)
[69] (J.A. 648–50, 653–54, 669, 680, 689–91, 1408–10, 1477.)

evidence in the light most favorable to Executors. ("Assignment of Error No. 3") (J.A. 150–53, 1247–51.)

d. **The trial court erred by granting Mrs. Glock's Motion to Strike Executors' Statutory and Common Law Conspiracy Claim (Count IX) at the close of Executors' evidence by making findings of fact and law contrary to the standard of review and failing to review the evidence in the light most favorable to Executors. ("Assignment of Error No. 4")** (J.A. 150–53, 1247–51.)

e. **The trial court erred in failing to grant Partial Summary Judgment Invalidating the Effect of the Bill of Sale, which, by its own terms, conveyed property that Mrs. Gelber did not own, as a matter of law. ("Assignment of Error No. 5")** (J.A. 131–32, 133–35, 348–51.)

f. **The trial court erred by refusing to admit evidence of the Edwardsville Home Real Estate Tax Assessment Pursuant to Va. Const. Art. X; Va. Code § 58.1-3201, and Va. Sup. Ct. R. 2:803(8). ("Assignment of Error No. 6")** (J.A. 150–53, 1151–53.)

g. **The trial court erred by awarding Mrs. Glock attorney's fees of $370,850.75, which award was unreasonable and shocks the conscience. ("Assignment of Error No. 7")** (J.A. 348–51.)

III. AUTHORITIES AND ARGUMENT

a. The Trial Court Erred in Striking Executors' Undue Influence Claim (Count I) (Assignment of Error No. 1).

For motions to strike, and on review of those motions, the Court must

> accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom which would sustain the plaintiff's cause of action. The trial court is not to judge the weight and credibility of the evidence, and may not

> reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense.

Austin v. Shoney's, Inc., 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997) (citations omitted). Only a party's ***unimpeached*** testimony may be relied upon to grant a motion to strike; adverse statements from an opposing party, if impeached, are not binding upon the party who introduced them. *Braden v. Isabell K. Horsley Real Estate Ltd.*, 245 Va. 11, 16–17, 425 S.E.2d 481, 484 (1993) (noting that *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922), is inapplicable to adverse statements isolated from a party's whole testimony, and finding reversible error in granting a defendant's motion to strike). A trial court's proper application of the law to facts poses a question of law and therefore the appellate court accords the trial court no presumption of correctness and reviews the application *de novo*. *See, e.g. Bd. of Zoning Appeals v. Caselin Sys., Inc.*, 256 Va. 206, 211, 501 S.E.2d 397, 400 (1998).

"'Direct proof of undue influence is often difficult to produce.'" *Estate of Parfitt v. Parfitt*, 277 Va. 333, 339, 672 S.E.2d 827, 829 (2009) (quoting *Bailey v. Turnbow*, 273 Va. 262, 267, 630 S.E.2d 291, 293 (2007)). Thus, Virginia law recognizes two circumstances that, if proven by clear and convincing evidence, presume undue influence: "[T]he presumption of undue influence arises and the burden of going forward with the evidence

shifts when [(1)] weakness of mind ***and*** grossly inadequate consideration **or** suspicious circumstances are shown ***or*** [(2)] when a confidential relationship is established." *Friendly Ice Cream Corp. v. Beckner*, 268 Va. 23, 33, 597 S.E.2d 34, 39 (2004) (emphasis in original).[70]

First, grossly inadequate consideration that shocks the conscience, when combined with other circumstances, may establish fraud or undue influence warranting rescission. *See Payne v. Simmons*, 232 Va. 379, 384, 350 S.E.2d 637, 640 (1986); *Fishburne v. Ferguson*, 84 Va. 87, 118–12, 4 S.E. 575, 580 (1887). A deed is presumed to result from undue influence if "the transaction occurred amidst 'circumstances of suspicion.'" *Martin v. Phillips*, 235 Va. 523, 528, 360 S.E.2d 397, 400 (1988).

Second, a confidential relationship " [I]s one wherein a party is bound to act for the benefit of another, and can take no advantage to himself … when … the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed." *Friendly*, 268 Va. at 34, 597 S.E.2d at 39–40 (quotation omitted). Thus, "a confidential relationship exists between a parent and child . . . when the family member provides financial advice or

[70] "To the extent *Martin* [*v. Phillips*, 235 Va. 523, 528, 369 S.E.2d 397, 400 (1988)] requires all three elements to be shown before the presumption of undue influence can be invoked, it is overruled." *Id.*

handles the finances of another family member." *Id.* (citation omitted). Joint account ownership where only one party contributes the account's assets presumes self-dealing in transactions benefiting the other party. *See Ayers v. Shaffer*, 286 Va. 212, 228, 748 S.E.2d 83, 92 (2013).

Executors established proof of all these circumstances giving rise to the presumption of undue influence. First, Executors proved Mrs. Gelber's weakness of mind and vulnerability on July 18, 2014, through the uncontroverted expert opinion of Dr. O'Neill,[71] numerous medical records,[72] and Dr. Gelber, who saw Mrs. Gelber ***minutes*** after the document execution, describing her as lethargic and confused, and even misidentifying him.[73]

Executors also proved "suspicious circumstances," because Mrs. Glock fabricated her account about the document execution (i.e., the *factum*). Phone records and Dr. Gelber's contemporaneous observations disprove her version of the document signing.[74]

July 18, 2016	**Event**
5:13 p.m.	Mrs. Glock arrives at St. Mary's Hospital and telephones Notary Public.[75]
5:32 p.m.	Dr. Gelber visits Mrs. Gelber in hospital and finds her

[71] (J.A. 706–88; *see* Pt.I(b), *supra*, at nn. 9–10, 23–24.)
[72] (J.A. 1456–61; *see generally* 1415–1505.)
[73] (J.A. 1388, 1174–75.)
[74] (J.A. 1114–27, 1174–75, 1388, 1510, 1512, 1388.)
[75] (J.A. 1114, 1120–21, 1510, 1512.)

	confused and unresponsive; Mrs. Glock is not there.[76]
5:52 p.m.	Mrs. Glock telephones the Landas' home after leaving St. Mary's Hospital.[77]

Mrs. Glock testified that she first called the hospital's notary public office when she arrived at the hospital in the "late afternoon" to obtain her mother's signatures.[78] Phone records confirmed this call occurred at 5:13 p.m.[79] Next, Mrs. Glock claimed that, coincidentally, her co-conspirators, the Landas, called her cell phone just prior to the document signing.[80] The phone records admitted at trial, however, prove that the Landas ***never*** made ***any*** calls to Mrs. Glock's cell phone after she summoned the notary.[81] Rather, the phone records reveal that Mrs. Glock later telephoned the Landas but not until 5:52 p.m.[82] This timeline is critical because it proved that Mrs. Glock and the Landas lied about the Landas' serendipitous, and self-serving call, during the document signing.

Text message records also proved Mrs. Glock's lie. Mrs. Glock telephoned the St. Mary's Hospital notary at 5:13 p.m. Dr. Lawrence Gelber was at his mother's hospital bedside, according to these records, at

[76] (J.A. 1189, 1388, 1173–74.)
[77] (J.A. 1510, 1512.)
[78] (J.A. 1114, 1120.)
[79] (J.A. 1510, 1512.)
[80] (J.A. 1121.)
[81] (J.A. 1510, 1512.)
[82] (J.A. 1510, 1512.)

5:32 p.m., just 19 minutes later.[83] By the time Dr. Gelber arrived, Mrs. Glock was gone from the hospital room.[84] This 19-minute window is the only time period in which the Landas could have called. The phone records prove no such call occurred. Mrs. Glock contrived the call.

Mrs. Glock's deceit is, obviously, suspicious. The jury could have reasonably inferred that Mrs. Glock and the Landas fabricated the coincidental bedside phone call to create the false impression that Mrs. Gelber was lucid, in good spirits, and knowingly surrendered hundreds of thousands of dollars' worth of property. That no such call occurred gives rise to the reasonable inference that the co-conspirators intended to deceive inquirers after the fact about their scheme and nefarious intentions to unduly influence their weakened and confused mother.

The document signing was also suspicious in that Dr. Gelber, himself a physician, saw his mother at 5:32 p.m., just 19 minutes after Mrs. Glock called the notary public's office. At that time, he observed his mother in an enfeebled and confused state.[85] She was non-responsive and refusing to eat, she was cognitively weak,[86] and susceptible to Mrs. Glock's undue

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[83] (J.A. 1388, 1173–74.)
[84] (J.A. 1172–73.)
[85] (J.A. 1174–75.)
[86] (J.A. 1173–75; *see also* Pt.I(b), *supra*, at nn. 9–10, 23–24.)

influence. In sum, the record abounded with suspicious circumstances creating a presumption of Mrs. Glock's undue influence.[87]

Also suspicious were other facts supporting the undue influence claim, including but not limited to the following:[88] (1) These transactions contradicted Mrs. Gelber's estate planning intentions, carefully planned

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[87] For the first time on appeal, *see* Brief in Opp. at 6–7, Mrs. Glock suggests that the timeline described above is immaterial because the phone records in question should be construed to reflect Coordinated Universal Time ("UTC"), i.e., four hours earlier, than Eastern Standard Time ("EST"). This argument is without merit. First, the evidence must be viewed in the light most favorable to Appellant, not Appellee. Second, Appellee should not be allowed to approbate, by agreeing to the admission of documents reflecting the timeline above, and reprobate on appeal, by now objecting to their accuracy and thus their relevance. *Rowe v. Commonwealth*, 277 Va. 495, 502, 675 S.E.2d 161, 164 (2009); (*see* J.A. 1212–13 (Mrs. Glock's agreement to the admission of Exhibit 52, the cell phone time line)). Third, the timeline above is consistent with Mrs. Glock's ***own testimony*** that the signings happened in the "late afternoon," (J.A. 1114) and not at 1:13 p.m. EST, which is what UTC time would have reflected. Fourth, even if the timeline is in UTC time, it remains ***uncontested*** that the phone records show no call from the Landas to Mrs. Glock's cell phone at any time on July 18 after Mrs. Glock called the notary public, which proves that Mrs. Glock's account of the Landas' call was a lie. Fifth, if Appellee wanted to argue at trial that some phone record evidence should weigh more than others, that argument was appropriate for the jury, not the trial court at a motion to strike.

[88] Other suspicious circumstances were presented: Mrs. Glock purportedly received the Edwardsville Home, which is in a retirement community that prohibits minor residents, such as Mrs. Glock's daughter. (J.A. 1208.). An unknown person pretending to Mrs. Fleischmann's husband cancelled a medical competency exam of Mrs. Gelber in late July. (J.A. 847–49, 862–63.) Mrs. Glock was observed entering the Edwardsville Home on July 23, 2014 and acting strangely. (J.A. 954–56.) The Landas and Mrs. Glock falsely led Mrs. Gelber to believe Mrs. Fleischmann took things from the Edwardsville Home without permission. (J.A. 981.)

with legal counsel;[89] (2) Mrs. Glock and the Landas secretly hired Attorney Eubank, a stranger to Mrs. Gelber who never met with or spoke to her, to prepare the conveyance documents instead of hiring Mrs. Gelber's estate planning lawyer Tim Guare, thus isolating Mrs. Gelber from any legal counsel;[90] and (3) Mrs. Glock took $7,500 in cash from her mother without permission or good reason.[91]

Through this combination of suspicious circumstances, Mrs. Glock took the Real and Personal Property for a mere $1, which the jury could have deemed inadequate consideration.

Second, the Executors proved Mrs. Glock's confidential relationship with Mrs. Gelber as her primary caregiver through Mrs. Glock's own testimony and her joint account holder status on Mrs. Gelber's bank account (funded solely by Mrs. Gelber),[92] from which account Mrs. Glock often paid herself a regular $500 allowance.[93]

Despite this evidence that entitled the Executors to a ***presumption*** of undue influence, the trial court committed reversible error by improperly making "findings of fact" and crediting Mrs. Glock's account (including her

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[89] (J.A. 611–16, 619–22, 616, 803–05, 1051–52, 1055, 1283–1314, 1553–1608.)
[90] (J.A. 884–85, 1051–54, 1099–1105, 1113, 1125, 1525–1608.)
[91] (J.A. 1130–35, 1321, 1408–10.)
[92] (J.A. 628–30, 1037–39, 1135–36, 1324–34.)
[93] (J.A. 1039–40, 1506–09.)

uncorroborated testimony of Mrs. Gelber's condition at the *factum*) as truthful on her Motion to Strike. It made that impermissible factual finding instead of viewing the evidence in the light most favorable to Executors.[94] In ruling that Mrs. Glock's account of the *factum* was entitled to greater weight, the trial court construed Executors' undue influence claim as a "testamentary capacity" claim, which it was not. For undue influence, Executors were entitled to present ***circumstantial evidence*** of Mrs. Gelber's "weakness of mind" to obtain the undue influence presumption. *See, e.g., Friendly*, 268 Va. at 33, 597 S.E.2d at 39. This created a jury question about Mrs. Gelber's reduced cognition, vulnerability, and susceptibility to Mrs. Glock's undue influence. *See Redford v. Booker*, 166 Va. 561, 575, 185 S.E. 879, 885 (1936) ("[Q]uestions of undue influence are submitted to the jury with greater readiness when the [grantor] is shown to have been in a state of physical feebleness or mental weakness when the will was executed.").

The trial court noted, and incorrectly deemed dispositive, that Executors' expert failed to assign greater weight and consideration to the testimony offered by Mrs. Glock, who was present at the *factum*, than what

[94] (J.A. 1247–51.)

he ascribed to the medical evidence of Mrs. Gelber's impairment.[95] This ruling ignored Executors' right to rely on circumstantial evidence and the pernicious inferences flowing from Mrs. Glock's lies about the *factum*.[96]

The trial court's error was, it appears, predicated on the incorrect belief that Executors were bound by the testimony of Mrs. Glock that they adduced in their case-in-chief. Mrs. Glock, below, urged the same erroneous view.[97] As noted above, however, adverse statements from an opposing party, if impeached, are not binding upon the party who introduced them. *Braden v. Isabell K. Horsley Real Estate Ltd.*, 245 Va. 11, 16–17, 425 S.E.2d 481, 484 (1993). Because Mrs. Glock's account was impeached, the Executors were not bound by it, and the trial court erred in sustaining the motion to strike based upon it. Some, but not all, of the impeachment of Mrs. Glock can be summarized as follows:

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[95] (J.A. 1247–50 (also erroneously noting Mrs. Glock was not deemed "adverse" despite being the Defendant, who was impeached); *see also* Brief in Opp. at 10 n.5 (conceding the trial court erroneously stated Mrs. Glock was not called as an adverse witness).)

[96] Mrs. Glock relied at trial on *Weedon v. Weedon*, 283 Va. 241, 720 S.E.2d 552 (2012), which is distinguishable on its facts. Here, there was evidence of Mrs. Gelber's impairment and confusion during and within minutes of the *factum*, of Mrs. Glock's deceit and manipulation of Mrs. Gelber, that Mrs. Glock deprived Mrs. Gelber of access to her lawyer, and of Mrs. Glock's lies to perpetrate her manipulation. No such evidence existed in *Weedon*.

[97] (J.A. 141–49, 1224–25, 1240, 1245–46.)

Glock's Statement	How Impeached
Claimed Mrs. Gelber cognitively well at time of document signing.[98]	Medical records, Dr. O'Neill, and Dr. Gelber all refuted that claim.[99]
Denied plan to build an addition to her house for Mrs. Gelber's future residence.[100]	Refuted by Mrs. Gelber's sworn affidavit, Mrs. Fleischmann, Dr. Gelber, and Ms. Arnowitz.[101]
Denied that she "helped hire a lawyer for her mother" to prepare the Deed of Gift and Bill of Sale.[102]	Attempted to hire Attorney Foreman, arranged the document signing, and paid for Attorney Eubank's legal services.[103]
Falsely alleged that Mrs. Fleischmann stole a silver tea set from her mother.[104]	Mrs. Fleischmann and Mrs. Gelber's granddaughters had permission from Mrs. Gelber to secure the tea set.[105]
Claimed she took $7,500 of Mrs. Gelber's cash, without permission, to pay bills on the house.[106]	At the time she stole Mrs. Gelber's money for home expenses, Mrs. Glock had already procured Deed of Trust divesting home from Mrs. Gelber.
Claimed she took $7,500 in cash because she did not know where the Beth Sholom Home would send bills. [107]	In fact, she admitted Mrs. Gelber to Beth Sholom Home and listed Dr. Gelber's address as the billing address without his knowledge or consent.[108]

[98] (J.A.1114–16, 1119, 1123–27.)
[99] (*See* Pt.I(b) *supra*, at nn. 9–10, 23–24.)
[100] (J.A. 1050.)
[101] (J.A. 625–26, 814–15, 820–21, 1172, 1335, 1388.)
[102] (J.A. 1103–04.)
[103] (J.A. 1113–14, 1125–26, 1525–29, 1530–32, 1549–52.)
[104] (J.A. 1106–11.)
[105] (J.A. 640–44, 901.)
[106] (J.A. 1131–32.)
[107] (J.A. 1135.)
[108] (J.A. 1164–67, 1322.)

Glock's Statement	How Impeached
Described herself as "not controlling at all." [109]	Was observed whispering furtively with Mrs. Gelber to manipulate her,[110] yelling at Mrs. Gelber to control her, and attempting to block family access to Mrs. Gelber's medical information contrary to Mrs. Gelber's wishes.[111]
Claimed that Mrs. Fleischmann was "controlling."[112]	Admitted that Mrs. Fleischmann used no force or threats against Glock. [113]

The trial court erred in holding, notwithstanding the impeachment of Mrs. Glock, that it was obliged to credit her testimony and assign it greater weight on a motion to strike just because Mrs. Glock purported to be present at the time Mrs. Gelber signed the conveyance documents.[114] Such testimony ***is*** preferred in testamentary capacity cases because wills are presumed valid if accompanied by certain procedural regularities, *see, e.g.*, Va. Code § 64.2-403, and the legal capacity requirement for testamentary executions is very low. The Deed of Gift and Bill of Sale, however, were *inter vivos*—not wills—and the trial court should not have imposed this different standard on Executors for their undue influence claim. Even if permitted to emphasize the *factum* evidence, if viewed in the light most

[109] (J.A. 1073.)
[110] (J.A. 632, 1163.)
[111] (J.A. 930–37, 950–52.)
[112] (J.A. 1071–90.)
[113] (J.A. 1073–76.)
[114] (J.A. 1249.)

favorable to the Executors, the trial court should have credited Dr. Gelber's account of Mrs. Gelber's confused state and the unimpeached medical record and expert opinion evidence over Mrs. Glock's lies.

b. The Trial Court Erred By Excluding Mrs. Gelber's Disavowal of the Property Transfers Despite the Dead Man's Statute (Assignment of Error No. 2).

Executors introduced numerous statements by Mrs. Gelber disavowing any intention to make the conveyances.[115] By affidavit and to numerous witnesses, Mrs. Gelber explained having no intention to make nor memory of the transfers; being very ill and feeling as if she had been "in a coma" while in the hospital; affirming that she would not have made the conveyances if she had been well; and that she wanted her property back.[116] In pretrial rulings and during the trial, when the Executors defended their proffer of Mrs. Gelber's affidavit and declarations under Va. Code § 8.01-397 and Rule 2:804(b)(5) of the *Virginia Rules of Evidence*, also known as the "Dead Man's Statute," the trial court admitted virtually all of Mrs. Gelber's statements into evidence over Mrs. Glock's objections.[117] Yet, after Executors rested, the trial court granted Mrs. Glock's Motion to

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[115] (J.A. 650–653, 669, 671–72, 697–98, 822–23, 912–14, 961–63.)

[116] (J.A. 1335, 1476–85, 1489, 1499, 650–53, 669, 671–672, 697–98, 822–23, 912–14, 961–63.)

[117] (J.A. 618–19, 649, 654, 820, 845, 848, 855, 1214–15.) Certain statements of Mrs. Gelber were not admitted erroneously. (J.A. 660–68, 908–10, 1609–11, 1615–22, 1182–86.)

Strike and, reversing its earlier rulings, excluded all of Mrs. Gelber's statements, except those offered by Mrs. Glock at the time of the *factum*.[118]

In its ruling, the trial court stated "[t]he Deadman Statute is not available to the plaintiff as to hearsay exceptions for Ms. Gelber's declarations not contemporaneous with the execution of the deed of gift and the bill of sale. Virginia law--Virginia case law supports this."[119] The trial court stated further: "[t]he Court acknowledges the statements even as was told to the court in reference to Mrs. Gelber, but, again, the burden has not been met in this matter."[120] The import of this latter ruling is unclear.

It is well-settled that a "court's interpretation and application of [a statute] presents a question of law that [the appellate court] will consider under a *de novo* standard of review." *Commonwealth v. Garrett*, 276 Va. 590, 599, 667 S.E.2d 739, 744 (2008); *see also Parfitt*, 277 Va. at 342, 672 S.E.2d at 830 (noting that a trial court's failure to identify the correct legal standard presents an issue of law that "like other issues of law" must be

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[118] The trial court overruled before trial, after lengthy briefing and argument and proffered corroboration of Mrs. Gelber's statements, Mrs. Glock's motion to exclude Mrs. Gelber's statements disavowing the Deed of Gift and Bill of Sale. (J.A. 401–77; J.A. 132.) Again, during the trial, the trial court admitted those statements. (*See, e.g.*, J.A. 1335, 649–54.) Yet, in granting the Motion to Strike, the trial court expressed its belief that the statements it admitted at trial were inadmissible, without explanation for the inconsistent rulings. (*See* J.A. 1249.)

[119] (J.A. 1249.)

[120] (J.A. 1251.)

reviewed *de novo*). Thus, whether the trial court correctly interpreted the plain terms of the Dead Man's Statute to find that it did not apply to Mrs. Gelber's statements outside of the *factum* presents a legal question reviewable by this Court *de novo*.

Alternatively, assuming the trial court properly interpreted and applied the Dead Man's Statute to Mrs. Gelber's statements, but found they must nevertheless be excluded, the trial court's exclusion of this evidence might be reviewed on appeal under an abuse of discretion standard. *Egan v. Butler*, 772 S.E.2d 765, 770 (Va. 2015) (citation omitted). *Barkley v. Wallace*, 267 Va. 369, 374, 595 S.E.2d 271, 274 (2004).

Because Mrs. Gelber had, by the time of trial, passed away, the Dead Man's Statute was essential to the admissibility of important evidence:

> [I]n an action . . . by the . . . trustee [or] executor, . . . of [a] person so incapable of testifying, ***no judgment*** or decree ***shall be rendered in favor of an adverse*** or interested ***party founded on his uncorroborated testimony***. In any such action, whether such adverse party testifies or not, ***all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings*** including without limitation those to which a person under a disability is a party.

Va. Code § 8.01-397 (emphasis added); *see* Va. Sup. Ct. R. 2:804(b)(5). This statute is plain and unambiguous on its face; this Court is bound by its

plain meaning as written. *See 1924 Leonard Rd., L.L.C. v. Van Roekel*, 272 Va. 543, 553, 636 S.E.2d 378, 384 (2006) (citations omitted).

The policy and legislative history behind this statute further illuminates the trial court's erroneous interpretation and application. "[T]he primary intent and purpose behind The Dead Man's Statute is to level the playing field and prevent self-serving testimony." *Richardson v. Maskell*, 64 Va. Cir. 196, 199 (Wise 2004); *see Diehl v. Butts*, 255 Va. 482, 488, 499 S.E.2d 833, 837 (1998) (noting the statute replaced the harsher common law rule that disqualified surviving interested parties from testifying); *Epes v. Hardaway*, 135 Va. 80, 84–85, 117 S.E. 603, 713–14 (1923) (noting the statute removed "practically all disqualifications" to "permit the courts to hear all evidence bearing on the question at issue" (internal quotation omitted)). Wrongdoers cannot escape justice because the victim has died.

This statute evolved from excluding an adverse party's testimony and a decedent's declarations, entries, and memos, *see* Va. Code § 3346 (1906), to "remov[ing] all disqualifications" to decedent statements presented by interested witnesses and admitting ***all*** notes, memos, and declarations, *see Arwood v. Hill's Adm'r*, 135 Va. 235, 241, 117 S.E. 603, 605 (1923); Va. Code § 6209 revisor's note (1919); POLLARD'S CODE BIENNIAL 1924 § 6209 at 237 (1924). Therefore, just as the Dead Man's

Statute's plain terms exclude any limitation on the causes of action to which it applies, the statute's legislative history favors a liberal construction to admit all of a decedent's statements when recorded or corroborated.

In short, the Dead Man's Statute permitted into evidence all of Mrs. Gelber's: (1) statements, if corroborated, which corroboration needed only be slight; and (2) written entries, memoranda, and declarations, made when she was competent. In this case, the Executors' testimony about Mrs. Gelber's disavowals, including statements about her estate planning intentions and mental condition on July 18, should have been admitted because they were corroborated by Mrs. Gelber's affidavit;[121] statements to social workers[122] and disinterested family members,[123] which mutually reinforced each other; and engagement of counsel to file the Complaint.[124] Mrs. Glock did not challenge, nor did the trial court hold, that these statements lacked corroboration, competence, or relevance.

Despite the plain language of the Dead Man's Statute, the trial court adopted the arguments of Mrs. Glock, who relied on a series of old cases, beginning with *Wallen v. Wallen*, 107 Va. 131, 157, 57 S.E. 596, 600 (1907), for the proposition that "declarations of the testator, not made

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[121] (J.A. 1335.)
[122] (J.A. 1476–84, 1489, 1490, 822–23.)
[123] (J.A. 912–14, 961–63.)
[124] (J.A. 1411–14.)

contemporaneously with the execution of his will . . . are not admissible to establish the substantive fact of undue influence." As a threshold matter, the statements introduced from Mrs. Gelber ***were not made by a testator***. The Bill of Sale and Deed of Gift were not wills that contain statutory procedural safeguards giving rise to presumptions of testamentary capacity; rather, they were *inter vivos* transfers affecting only a portion of Mrs. Gelber's estate. Thus, *Wallen* does not apply.

Further, the *Wallen* court did not address the Dead Man's Statute ***at all***. This is important for two reasons. First, *Wallen* can hardly be read to prohibit a decedent's statements based on interpretation of a statutory hearsay exception that is not even cited, much less discussed, in the decision. Second, even if *Wallen* had cited to the Dead Man's Statute, the statute as it existed at that time (i.e., in 1907) operated entirely different from the current version. This 1907 version was much narrower in scope and operated to disallow almost all decedents' statements; after the 1919 amendment to the statute, the General Assembly provided that corroboration and proper instruction to the jury offered safeguards for the admissibility of decedents' statements to protect the interests of decedents in litigation that survived their deaths. *See* Va. Code § 6209 revisor's note (1924); *Arwood*, 135 Va. at 241–42, 117 S.E. at 605.

Neither did *Wallen*'s successors, *Core v. Core*, 139 Va. 1, 124 S.E. 453 (1924)[125] or *Savage v. Nute*, 180 Va. 394, 402, 23 S.E.2d 133, 137 (1942),[126] upon which Mrs. Glock also relied, address or even cite the Dead Man's Statute. Nevertheless, Mrs. Glock argued that these cases nullified and overruled the statute's plain meaning and operated to make the statute inapplicable to undue influence cases[127] (by the time of *Core* and *Savage*, the Dead Man's Statute was amended closer to its current iteration).

To the contrary, in *Parfitt*, 277 Va. at 343, 672 S.E.2d at 831, this Court explained a party "is not precluded from offering proof of undue influence on ***any*** basis including the confidential relationship," (emphasis added) necessarily implying the Dead Man's Statute may be used to prove undue influence. The statute unambiguously states that a decedent's statements "***relevant to the matter in issue***, may be received as evidence in ***all proceedings*** including ***without limitation*** those to which a person under a disability is a party." Va. Code § 8.01-397 (emphasis added).

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[125] *Core* specifically permitted admission of statements, even by a testator, that fell within an exception to the rule against hearsay. *Id.* at 9, 124 S.E. at 455 (quoting *Rusling v. Rusling*, 36 N.J. Eq. 603 (1883)). The Dead Man's Statute is just such an exception.

[126] After the Dead Man's Statute's 1919 legislative change permitting admission of all decedent statements, the court decided *Core* and *Savage*, while citing to *Wallen*, but neither case addressed the statute at all.

[127] The trial court's ruling is unclear, but it excluded consideration of these statements for all the counts in the Amended Complaint. Mrs. Glock did not argue they were inadmissible except regarding undue influence.

Nothing in the express language of this statute invites an interpretation that prohibits its application to cases involving undue influence or any of Executors' other numerous causes of action, namely fraud, statutory and common law conspiracy, conversion, and detinue.

Further, *Wallen* has been distinguished to permit a decedent's declarations that a testator would not have acted contrary to long-standing estate planning. *See Jackson v. Hewlett*, 114 Va. 573, 578, 77 S.E. 518, 520 (1913). Thus, even assuming that *Wallen* limited the Dead Man's Statute, which it does not, the *Jackson* distinction should have permitted into evidence Mrs. Gelber's statements that the Real and Personal Property conveyances were contrary to her long and well-known planning.

Similarly, while a person of feeble intellect may still have testamentary capacity, this same feebleness may be sufficient to show the person was preyed upon and unduly influenced.[128] Mrs. Gelber's

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[128] It is well established that:

> [A] person of feeble intellect is much more easily influenced by undue means than is one of a vigorous mind; therefore, in passing upon a question of undue influence, the strength and condition of the mind may become a proper, indeed an essential, subject of inquiry; for although weakness, whether arising from age, infirmity, or other cause, ***may not be sufficient to create testamentary incapacity, it may nevertheless form favorable conditions for the exercise of undue influence***.

statements should have been admitted to raise a jury question both about her intent and mental impairment at the time of the *factum*, and the suspicious circumstances surrounding the *factum*.

In urging the trial court to follow *Wallen*, Mrs. Glock pointed out this Court recently cited *Wallen* in the undue influence case of *Weedon v. Weedon*, 283 Va. at 257, 720 S.E.2d at 560, but this interpretation mischaracterized *Weedon's* use of *Wallen*. *Weedon* cited *Wallen* merely for the undisputed rule that "[t]he ultimate burden of proof 'is always upon him who alleges fraud.'" *Id.* (quoting *Wallen*, 107 Va. at 150, 57 S.E. at 599), and not for the proposition that the Dead Man's Statute was inapplicable in an undue influence case. The Executors do not contest their ultimate burden; rather, they seek to meet this burden using evidentiary rules that permit Ms. Gelber's statements to establish Mrs. Glock's undue influence.

The trial court's refusal to apply the Dead Man's Statute to Mrs. Gelber's non-*factum* statements supporting Mrs. Glock's undue influence and impeaching Mrs. Glock's self-serving testimony constituted legal error. The ruling deprived the Executors from playing on a level field to impeach

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Redford v. Booker, 166 Va. 561, 574–75, 185 S.E. 879, 885 (1936) (internal quotation omitted) (emphasis added).

Mrs. Glock. The trial court further compounded its error by crediting Mrs. Gelber's alleged statements at the *factum* through Mrs. Glock's testimony, namely that in response to Mrs. Glock's question "Mom, are you sure?," Mrs. Gelber purportedly said "Just give me the pen" before signing.[129] Thus, the trial court admitted the decedent's statements to support Mrs. Glock, but erred in excluding statements to support the Executors' position.

c. The Trial Court Erred in Striking Executors' Fraud Claim (Assignment of Error No. 3).

The motion to strike standard of review, requiring that evidence be viewed in the light most favorable to appellants with *de novo* review of the trial court's ruling, applies to this third assignment of error. *See Costner v. Lackey*, 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982). The evidence proved that Mrs. Glock fraudulently induced Mrs. Gelber into executing the Deed of Gift and Bill of Sale in this case. Indeed, a "false representation of a material fact, constituting an inducement to the contract . . . is always ground for rescission of the contract." *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 220 Va. 109, 111–12, 255 S.E.2d 682, 683 (1979).

To the extent the trial court struck the fraud claim for lack of proof of damages,[130] that ruling was error. The Executors in this case sought

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[129] (J.A. 1125–26.)
[130] (J.A. 1249.)

rescission of the Bill of Sale and Deed of Gift, as opposed to money damages, making ***any*** damages evidence unnecessary to prove. *Horner v. Ahern*, 207 Va. 860, 867, 153 S.E.2d 216, 221 (1967) ("One complaining of fraud and deceit may ***either*** rescind what was done as a result thereof ***or*** affirm the action taken and sue for damages." (emphasis added)).[131]

The trial court also erroneously held the fraud claim should be struck because the evidence did not prove a "misrepresentation."[132] Yet a claim for fraud may be based on a "present intention not to perform [the promise]." *Lloyd v. Smith*, 150 Va. 132, 145, 142 S.E. 363, 365 (1928). "[T]he promisor's intention—his state of mind—is a matter of fact" and "if made to induce the promise to act to his detriment, is actionable as an actual fraud." *Blair Constr. v. Weatherford*, 253 Va. 343, 348, 485 S.E.2d 137, 139 (1997) (citing *Lloyd*, 150 Va. at 145–47, 142 S.E. at 365–66). This Court has permitted a fraud in the inducement claim to reach a jury in this way numerous times. *See, e.g.*, *Boykin v. Hermitage Realty*, 234 Va. 26, 29–30, 360 S.E.2d 177, 178–79 (1987); *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 363–64, 699 S.E.2d 483, 490 (2010).

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[131] On appeal, Mrs. Glock has abandoned the erroneous argument that a fraud action requires proof of monetary damages when the relief sought is rescission of the conveyances. *See* Brief in Opp. at 15–17 (omitting any reference to this line of argument notwithstanding extensive reliance upon it, both by Mrs. Glock and the trial court.) (J.A. 1222, 1226, 1249.)

[132] (J.A. 1248.)

Mrs. Glock, before the conveyances, promised to sell the Real Property to fund an addition to Mrs. Glock's residence for Mrs. Gelber to use in the remainder of her life.[133] Later, however, Mrs. Glock denied any such plan.[134] This denial came despite Mrs. Gelber's statements to the opposite effect as well as corroboration by others recalling Mrs. Glock making that very promise.[135] Viewed most favorably to the Executors, Mrs. Glock's denial of this plan proves she never intended to honor her promise, which induced Mrs. Gelber to convey the Real Property in the first place.

The jury should have been permitted to consider the credibility, weight, and significance of the evidence that Mrs. Glock made the promise for an addition, that Mrs. Gelber relied upon that promise, and Mrs. Glock's after-the-fact repudiation of that promise. If those credibility determinations had been made unfavorably to Mrs. Glock, then the jury could have reasonably inferred Mrs. Glock's intent to defraud her mother with a false promise. The trial court erred in taking those credibility determinations away from the fact-finder and substituting its own judgment instead.

Mrs. Glock has not meaningfully disagreed with the legal paradigm described above. Rather, she has claimed, in derogation of the standard of

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[133] (J.A. 612–13, 624–26, 814–15, 820–21, 1171–72, 1335, 1388.)
[134] (J.A. 1050–51.)
[135] (J.A. 1388, 624–26, 814–15, 820–21, 1050–51, 1171–72.)

review, that no evidence was adduced of Mrs. Gelber's reliance upon Mrs. Glock's false promises, ignoring Mrs. Glock's own account of having been misled by Mrs. Gelber. *See* Brief in Opp. at 17. Mrs. Glock similarly claimed that no evidence existed of Mrs. Glock's false promise. *See id.* at 16. As explained above, the Executors offered precisely that proof.[136]

Executors were thus entitled to a jury determination of fraud against Mrs. Glock, which, if decided favorably, would have rescinded the transfers.

d. The Trial Court Erred in Striking Executors' Conspiracy Claims (Assignment of Error No. 4).

The motion to strike standard of review governs this Court's consideration of the trial court's decision to strike the Executors' common law and statutory conspiracy claims. *See Costner*, 223 Va. at 381, 290 S.E.2d at 820. To the extent that the trial court erred by interpreting the civil conspiracy statute as inapplicable to the present suit because of its interpretation of the statute's meaning, it is well established that such "[a] question of statutory interpretation is subject to review *de novo* on appeal." *Bennett v. Commonwealth*, 60 Va. App. 656, 665, 731 S.E.2d 40, 44

[136] Mrs. Glock also relies on *Chappel v. Trent*, 90 Va. 849, 19 S.E. 314 (1893), for the proposition that "[f]raud presupposes the existence of testamentary capacity." *See* Brief in Opp. at 17. *Chappel* is inapposite. The present case is not a will contest , and does not involve a question of testamentary capacity (the test for which is not the same as that for undue influence). Moreover, *Chappel* did not purport in any regard to describe the elements of a fraud claim which was not at issue in that case.

(2012). The trial court's reasoning for granting the motion to strike regarding conspiracy remains unclear because the trial court said nothing about the conspiracy count in announcing its ruling.[137]

The civil conspiracy statute, Va. Code § 18.2-499(A), states in pertinent part:

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) ***willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act***, shall be jointly and severally guilty of a Class 1 misdemeanor.

(Emphasis added); *see* Va. Code § 18.2-500 (creating a civil right of action for violations of § 18.2-499). The plain meaning of subsection (A)(ii) of § 18.2-499, contains ***no*** reference at all to any requirement that Mrs. Gelber's injury be related to a business. In contrast, subsection (A)(i) of the statute does contain such a requirement, but that is not the subsection relied upon by the Executors. Thus, the civil conspiracy statute expressly permits the Executors to prosecute their claim by proving that Mrs. Gelber was conspired against "to do or perform any act against [her] will." *See* Va. Code § 18.2-500(ii); *see also, e.g.*, *Va. Dep't of Corrs. v. Surovell*, 290 Va. 255, 268, 776 S.E.2d 579, 586 (2015) ("When the language of a statute is

[137] (J.A. 1246–51.)

unambiguous, we are bound by the plain meaning of that language."); *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934) (same).

In fact, the Executors established a civil conspiracy under both the civil statute and at common law, contrary to the trial court's ruling. Mrs. Glock and the Landas worked together to unlawfully induce Mrs. Gelber into giving away her Real and Personal Property, as follows:

Together, both the Landas and Mrs. Glock first attempted to hire Mr. Foreman by each calling him between July 10 and 14, 2014, but he declined the engagement because of his apprehension about the hurried nature of the request.[138] Next, they hired Tom Eubank's law firm to draft the legal documents.[139] Instead of hiring Mrs. Gelber's estate planning attorney, Mr. Guare, who was known to all of them, they hired Mr. Eubank, who himself and whose firm never met or spoke with Mrs. Gelber.[140] On July 17, Mrs. Glock picked up the Deed of Gift and Bill of Sale from the law firm and brought them straight to Mrs. Gelber while she was debilitated in the hospital.[141] Then, without giving Mrs. Gelber access to legal advice or time to even read the documents, Mrs. Glock facilitated the execution of the

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[138] (J.A. 1525–29.)
[139] (J.A. 878–92, 1530–52.)
[140] (J.A. 881–83, 1530–32 at ¶¶ 11–16.)
[141] (J.A. 1114–15, 1125, 1530–32 at ¶¶ 12–14.)

documents in front of a notary.[142] Mrs. Glock then returned them to the law firm for recording and paid for the legal services from her personal checking account.[143] Thereafter, Mrs. Glock and the Landas fabricated an account of the document signing, claiming the Landas witnessed the event coincidentally by telephone, despite contrary evidence.[144] Notably, phone records revealed that Mrs. Glock and the Landas made six times more phone calls to each other in July compared to June and August.[145]

These facts, together, proved that Mrs. Glock and the Landas combined to compel Mrs. Gelber to execute the Deed of Gift and Bill of Sale against her will, as established through her prior estate planning.[146] This proven conduct, when viewed in the light most favorable to the Executors, established proof sufficient to survive Mrs. Glock's motion to strike. The trial court erred in short-circuiting the Executors' ability to argue this evidence to the jury.

e. The Trial Court Erred By Denying Partial Summary Judgment When the Bill of Sale Conveyed Property that Mrs. Gelber Did Not Own. (Assignment of Error No. 5).

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[142] (J.A. 1091–92, 1113–14, 1119–21, 1124–25, 1530–32.)
[143] (J.A. 1530–52.)
[144] (J.A. 1189, 1121–23, 1388, 1510–16.)
[145] (J.A. 1517–18.)
[146] (J.A. 1586–89; *see generally* J.A. 1553–1608.)

The trial court's denial of Executors' motion for partial summary judgment (the "PSJ Motion") requires "review [of] the application of law to undisputed fact *de novo*." *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 301, 749 S.E.2d 176, 183 (2013) (quotations omitted).[147]

The parties do not dispute that in 2010 Mrs. Gelber executed the TPP Deed to transfer the Personal Property to her living trust (the "Trust" as established by the "Trust Agreement").[148] Mrs. Gelber signed the TPP Deed twice: first, in her individual capacity as "Beverly E. Gelber," granting all her Personal Property to the Trustee, Mrs. Gelber, at the time, then second, as "Beverly E. Gelber, Trustee" to acknowledge her receipt of the

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[147] Mrs. Glock contends erroneously that the Executors failed to preserve this issue for appeal. Yet the record plainly reveals that the Executors expressly objected to the Court's October 26, 2015 Order (J.A. 133–35.) denying the Motion, which objection was repeated in the January 4, 2016 Final Order. (J.A. 348–51.) Mrs. Glock's argues, without foundation, that the Executors' withdrawal of Count VIII–Unlawful Transfer of Property, precludes this Assignment of Error. Upon withdrawal of Count VIII, the Executors expressly disavowed any such preclusion, and the corresponding order had no effect on the PSJ Motion, which remained under advisement at that time. (J.A. 136–37.) Moreover, the remaining counts of undue influence, fraud, conspiracy, conversion, and detinue all allege that Mrs. Glock used the Bill of Sale to "possess" the Personal Property, without conceding that title was properly transferred and the conversion count expressly asserted Mrs. Glock's unlawful acquisition of the Personal Property; in this way, the question of the legal effect of the Bill of Sale remained in dispute throughout the trial. (J.A. 16–22.)

[148] (J.A. 1303–10, 1315.)

property as Trustee.[149] Thus, Mrs. Gelber held legal title to the Personal Property ***solely*** in her capacity as Trustee. This role separation follows the requirement that a donor separate from her interest and title to property to create a trust. *See Ballard v. McCoy*, 247 Va. 513, 517, 443 S.E.2d 146, 148 (1994) ("No trust can arise while the settlor retains both the full equitable interest and legal title in the trust property, since an essential characteristic of a trust is that the settlor effects the separation of these interests in the trust property."); *Estate of Ware v. Comm'r*, 55 T.C. 69, 79 (1970) (same). Yet the Bill of Sale, upon which Mrs. Glock relies to claim title over the Personal Property, expressly conveyed property from Mrs. Gelber in her individual capacity and ***not*** as Trustee. Thus, because Mrs. Gelber did not own the Personal Property individually, the Bill of Sale failed, as a matter of law, to convey the Personal Property to Mrs. Glock.

The Trust Agreement[150] is the sole authority for determining how to transfer trust property and must be construed according to its intent and "stand or fall on its own terms." *Ballard*, 247 Va. at 517, 443 S.E.2d at 148 (citing *Bickers v. Shenandoah Valley Nat'l Bank*, 197 Va. 145, 153, 88 S.E.2d 889, 894 (1955)); *see also Austin v. City of Alexandria*, 265 Va. 89, 96, 574 S.E.2d 289, 293 (2003). The Trust Agreement states, "During my

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[149] (J.A. 1303–10, 1315.)
[150] (J.A. 1303–10.)

lifetime ***my Trustee*** shall apply as I may direct any income of the trust. In addition, ***my Trustee*** shall distribute principal from the trust as I may direct."[151] Mrs. Gelber could direct the trust property distribution, but only her Trustee could make such transfers, according to the Trust Agreement.[152] It is axiomatic that a property owner can only convey what he or she actually owns. *See, e.g.*, *Allsbrook v. Azalea Radiator Serv., Inc.*, 227 Va. 600, 603, 316 S.E.2d 743, 745 (1984).

The trial court should have followed *Austin v. City of Alexandria*. In *Austin,* as here, the grantor, trustee, and beneficiary of a living trust were the same person, James M. Duncan, Jr. *See* 265 Va. at 91–93, 574 S.E.2d at 290–91. Duncan similarly conveyed property from his trust in his individual capacity, contrary to the requirements of the living trust. *Id*. Duncan's failure to identify himself as grantor in his trustee capacity proved fatal to Duncan's attempted conveyance, and this Court invalidated the transfer because Duncan, individually, had no legal title to the property. *Id.* at 96–97, 574 S.E.2d at 293.

This Court should follow *Austin* which is, in its material facts and principles, indistinguishable from the case at bar. By failing to convey property as "Trustee," Mrs. Gelber's signature did not meet the conditions

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[151] (J.A. 1304 at Art. II(A) (emphasis added).)
[152] (J.A. 1304 at Art. II(A); 1307 at Art. V.)

necessary to properly transfer title to the Personal Property according to the Trust Agreement, which permits only "my Trustee" to make such property transfers. Nor can the Bill of Sale be construed as an instruction from Mrs. Gelber to her Trustee to distribute Trust property—the document says nothing of the sort. It makes no reference to the Trust at all. Thus, the omission of the "Trustee" title in the Bill of Sale is critical.

The Bill of Sale further lacks any reference to the TPP Deed, or any indication that the TPP Deed had been revoked or nullified prior to the Bill of Sale's execution. No evidence was offered to disprove that the TPP Deed controlled or that Mrs. Gelber, as Trustee, transferred legal title to the Personal Property away from the Trust. To the contrary, the TPP Deed on its face reflects Mrs. Gelber's clear intention in 2010 to treat her individual interests differently from those of her Trustee, an intention that comports with the law requiring legal separation between a settlor and a trustee. *See Ballard*, 247 Va. at 517, 443 S.E.2d at 148. Thus, viewed in most favorably to the Executors, only the Trustee had legal title to the Personal Property.

Mrs. Glock contends the Trustee and Mrs. Gelber were alter-egos of each other such that the failure of the Bill of Sale is one of form, not function. This argument, however, invites this Court to gloss over critical differences between a donor and her trust and to minimize the separation

of legal title that is critical to the function of a trust. By this logic, Mrs. Glock would have this Court conflate the roles of donor and trustee to defeat the inherent and overriding purpose of Mrs. Gelber's careful estate plans, notwithstanding her protective measure to convey her Personal Property to the Trustee, whose identity might change over time. Such a construction would render the Trust Agreement and the TPP Deed legal nullities.

Mrs. Glock's claim to the Personal Property by this Bill of Sale, therefore, depends on this Court's treatment of those undisputed, carefully planned, and duly executed documents as if they had never been created, as if they did not reflect Mrs. Gelber's intent, and as if they were of no legal consequence. That is not hyperbole. If Mrs. Glock can not only retain possession, but also establish title to the Personal Property, the Trust Agreement and TPP Deed notwithstanding, that result will be precisely the same as if the Trust Agreement and TPP Deed had never been executed.

The trial court denied the Motion without explanation and, as argued above, in error.

f. The Trial Court Erred in Excluding the Real Estate Tax Assessment from Trial (Assignment of Error No. 6).

The trial court's exclusion of the certified real estate tax assessment for the Real Property (the "Tax Assessment") must be reviewed under an abuse of discretion standard. *See Egan*, 772 S.E.2d at 770.

Even though the Executors sought rescission as their primary remedy in this case, which requires no evidence of money damages,[153] The Executors offered sufficient evidence to establish the fair market value of the Real Property at $330,700 in 2015.[154] Real property damages need not be established by only expert testimony of fair market value. *See Boone v. Stacy*, 597 F. Supp. 114, 117 (citing numerous Virginia cases).[155] Tax assessments suffice without an expert because "[a]ll assessments of real estate and tangible personal property ***shall be at their fair market value***, to be ascertained as prescribed by law." Va. Const. art. X, § 2 (emphasis added); *see also* Va. Code § 58.1-3201 (requiring real estate assessments to be at fair market value). Indeed, "a taxing authority's assessment is presumed to be correct." *TB Venture, LLC v. Arlington County*, 280 Va. 558, 563, 701 S.E.2d 791, 794 (2010).

Rule 2:803(8) recognizes public records as a hearsay exception. The trial court erroneously excluded the Tax Assessment notwithstanding that it is a "report" "in any form" "prepared by [a] public office[]" of the County of Henrico, "setting forth . . . matters observed within the scope of the office['s]

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[153] *See* Pt.II(c), *supra* (arguing no such proof was required). The trial court was not clear which counts it struck for the failure to prove damages.
[154] (J.A. 1612–14, 1151–53.)
[155] In fact, lay testimony is sufficient. *Quillen v. Tull*, 226 Va. 498, 504, 312 S.E.2d 278, 281 (1984); *see* Rule 2:701; Va. Code § 8.01-401.3(B).

. . . duties." *See id.* No one contested the authenticity of the assessment, yet the trial court ruled, without explanation, that the assessment was "double hearsay."[156] The trial court later reversed itself by admitting the same tax assessment at the attorney's fees hearing where Executors offered it under the same hearsay exception, but it did not revise its ruling excluding the tax assessment from consideration by the jury.[157]

Mrs. Glock relies on this Court's decision in *Frank Shop v. Crown Cent. Petroleum, Corp*., 261 Va. 169, 540 S.E.2d 897 (2001), for the proposition that the tax assessment offered in this case should have been excluded. *Frank Shop* compels the opposite result. There, this Court held that where a private individual submits a document to a governmental agency, it does not morph into a governmental document because "it was not prepared by a public official and does not reflect facts or events within the personal knowledge and observation of the recording official to which he could testify should he be called as a witness." *Id*. at 261 Va. at 175, 240 S.E.2d at 901. Obviously, the tax assessment in this case was prepared by a governmental official and was not a mere filing or

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[156] (J.A. 1151–53.)
[157] (J.A. 1250–51, 1612–14.)

submission by a private individual. *Frank Shop* thus counsels in favor, not against, admission of the assessment.[158]

In ruling on Mrs. Glock's Motion to Strike, the trial court noted that "[t]he damages were not proven,"[159] indicating the consequential impact this erroneous exclusion had on the case's dismissal.

g. The Trial Court Erred By Awarding Mrs. Glock Attorney's Fees of $370,850.75. (Assignment of Error No. 7).

On appeal, "[t]he amount of the fee award rests within the sound discretion of the trial court, and [the Supreme Court must] give deference to the judgment of the trial court upon appellate review." *Ulloa v. QSP, Inc.*, 271 Va. 72, 82, 624 S.E.2d 43, 49 (2006) (citation omitted).

The sole basis for the fees awarded in the Counterclaim (the "Award") is the Bill of Sale, the subject of which is limited to the Personal

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[158] Mrs. Glock also urges that statements of opinion are inadmissible pursuant to Rule 2:803(8). *See* Brief in Opp. at 22 (*citing Adjei v. Commonwealth*, 63 Va. App. 727, 740 (2014)). As a threshold matter, *Adjei* did not interpret Rule 2:803(8) and because it ruled no opinion testimony was admitted, any assertion regarding opinion testimony being admitted pursuant to 2:803(8) is mere *dicta*. More importantly, the *Adjei* court's reasoning in this regard relied upon *Bond v. Commonwealth,* 226 Va. 534, 537, 311 S.E.2d 769, 771 (1984). But this Court in *Bond* did not consider the scope of Rule 2:803(8). Rather, the statute this Court construed in *Bond* was Va. Code § 19.2-188, a criminal procedure statute that prescribes the admissibility of evidence from certain autopsy reports.

[159] (J.A. 1249.)

Property and ***not*** the Real Property.[160] The trial court, therefore, had to determine whether Mrs. Glock's fees—in excess of $370,850.75—were reasonable given that she valued the Personal Property at a mere $34,744 through her own expert.[161] While the parties stipulated to the reasonableness of Mrs. Glock's fees for ***both*** the Real and Personal Property, Executors did ***not*** agree such high fees were reasonable for the Personal Property claim alone.[162] Yet the trial court ruled them reasonable to defend Personal Property valued at less than 10% of the Award.

Mrs. Glock offered no authority to support the trial court's finding of reasonableness or to justify bootstrapping her fees for the Personal Property to that of the Real Property, for which there was no right to depart from the "American Rule." *See Lee v. Mulford*, 269 Va. 562, 565, 611 S.E.2d 349, 350 (2005). Under this longstanding rule, "generally, absent a specific contractual or statutory provision to the contrary, attorney's fees are not recoverable by a prevailing litigant from the losing litigant." *Id.* (quotation omitted). Yet, the only basis for the attorney's fee award was the warranty in the Bill of Sale.[163]

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[160] (J.A. 116–17.)
[161] (J.A. 247–329, 1257–82.)
[162] (J.A. 245–46.)
[163] (J.A. 116–17.)

Rule 1.5 of the *Virginia Rules of Professional Conduct* states that "[a] lawyer's fee shall be reasonable," and reasonable includes consideration of "(4) the amount involved and the results obtained . . . ." Virginia law requires that, among other non-exhaustive factors, the Court must consider "whether the services were necessary and appropriate." *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998). If the "amount involved" in a claim was a pertinent factor to the Court's decision—as it must be—the scant valuation of the Personal Property by Mrs. Glock's own expert indicates the unreasonableness of the Award.

Alternatively, the Executors urged the trial court to apportion fees according to the value of the Personal Property as a more reasonable method consistent with *Ulloa*. There, the prevailing party won its breach of contract claim but not its business conspiracy or trade secrets claims. 271 Va. at 83, 624 S.E.2d at 50. This Court ruled the resulting fee award was unjustified because no basis existed for the winner to recover ***any*** fees associated with its lost trade secrets and business conspiracy claims. *Id.* "[S]imply because all of [the prevailing party's] claims 'were intimately intertwined and depended upon a common factual basis'" the prevailing party was not relieved of its burden to specify fees associated only with its successful breach of contract claim. *Id.*

Mrs. Glock's success regarding the Real Property makes no difference. Under *Ulloa*, she had no right to a fee award for a claim unsupported by statute or contract. She cannot be relieved of ***her*** burden to reasonably specify the basis for fees associated only with the Counterclaim related to the Personal Property, no matter how intertwined that claim was with her defenses associated with the Real Property.[164] The American Rule still stands, and Mrs. Glock has no legal right—especially without an expert, other evidence, or authority to justify the reasonableness—to the full Award. The trial court erred.

IV. CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed and the matter remanded for a new trial.

Date: October 24, 2016 **Respectfully submitted,**

LAWRENCE E. GELBER AND DARLENE A. FLEISCHMANN, Co-Executors of the Estate of Beverly E. Gelber, Deceased and Co-Trustees of The Beverly E. Gelber Trust, Dated Dec. 1, 2010, as restated and amended

By: Cullen D. Seltzer
Counsel

[164] Mrs. Glock relies on *Sheets v. Castle*, 263 Va. 407, 413 (2002) for the proposition that because she prevailed at trial, she was entitled to all of her attorney fees regardless of their reasonableness or proportion to the nature of her claim. Brief in Opp. at 24. *Sheets* decided no such principle; rather it decided only what is meant by prevailing party. *Id*. at 263 Va. at 413–14, 559 S.E.2d at 620.

V. CERTIFICATE OF SERVICE

Pursuant to Rule 5:26, I hereby certify the following:

a. Appellants/Plaintiffs and Counterclaim Defendants are Lawrence E. Gelber and Darlene A. Fleischmann, Co-Executors of The Estate of Beverly E. Gelber, Deceased, and Co-Trustees of The Beverly E. Gelber Trust u/a Dated December 1, 2010, as restated and amended. Appellants are represented by:

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b. Mrs. Glock/Defendant and Counterclaim Plaintiff is Meryl Ann Glock. Appellee is represented by:

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c. Counsel for Appellants certifies that on the 24th day of October, 2016, one electronic (.PDF) copy and one paper copy of the Opening Brief were correspondingly e-mailed and mailed by first-class mail, postage prepaid, to all counsel. Counsel for

Appellants further certifies that ten (10) printed copies of the Opening Brief were also filed in the office of the Clerk of the Supreme Court of Virginia.

d. Counsel for Appellants certifies that on the 24th day of October, 2016, one electronic (.PDF) copy and one paper copy of the Joint Appendix were correspondingly e-mailed and mailed by first-class mail, postage prepaid, to all counsel. Counsel for Appellants further certifies that three (3) printed copies of the Joint Appendix were also filed in the office of the Clerk of the Supreme Court of Virginia.

e. Appellants desire to state orally the reasons why the judgment below should be reversed and remanded.

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